Nos. 90-1604
90-1606

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In The

Supreme Court of the United States

October Term, 1990

DAN MORALES, ATTORNEY GENERAL OF TEXAS, et al.,

Petitioners,

vs.

TRANS WORLD AIRLINES, INC., et al.,

Respondents.

On Petitions For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF AMICI CURIAE OF THE STATES OF HAWAII, ALABAMA, INDIANA, LOUISIANA, MISSISSIPPI, NEW JERSEY, NEW MEXICO, PENNSYLVANIA, UTAH AND VIRGINIA IN SUPPORT OF PETITIONERS

WARREN PRICE, III*
Attorney General
State of Hawaii
*Counsel of Record

GIRARD D. LAU
RŌBERT A. MARKS
STEVEN S. MICHAELS
Deputy Attorneys General
State of Hawaii

425 Queen Street
Honolulu, Hawaii 96813
(808) 586-1363

Counsel for Amicus Curiae State of Hawaii

[Other Counsel of Record Listed on Inside Cover]

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

Hon. James H. Evans
Attorney General of
Alabama
Alabama State House
Montgomery, Alabama
36130
(205) 242-7300

Hon. Linley E. Pearson
Attorney General of
Indiana
State House, Room 219
Indianapolis, Indiana 46204
(317) 232-6201

Hon. William J. Guste, Jr.
Attorney General of
Louisiana
State Capitol
Baton Rouge, Louisiana
70804-9005
(504) 342-7013

Hon. Mike Moore
Attorney General of
Mississippi
P.O. Box 22947
Jackson, Mississippi 39225
(601) 354-6018

Hon. Robert J. Del Tufo
Attorney General of
New Jersey
Richard J. Hughes
Justice Complex
CN112
Trenton, New Jersey 08625
(609) 984-9664

Hon. Tom Udall
Attorney General of
New Mexico
P.O. Drawer 1508
Santa Fe, New Mexico
87504-1508
(505) 827-6014

Hon. Ernest Preate, Jr.
Attorney General of
Pennsylvania
16th Floor, Strawberry
Square
Harrisburg, Pennsylvania
17120
(717) 787-3391

Hon. Paul Van Dam
Attorney General of Utah
236 State Capitol
Salt Lake City, Utah 84114
(801) 538-1015

Hon. Mary Sue Terry
Attorney General of
Virginia
101 North 8th Street
Richmond, Virginia 23219
(804) 786-3149

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The amici States enumerated above, by their respective Attorneys General, submit this brief in support of the petitions for certiorari to the United States Court of Appeals for the Fifth Circuit filed by the Attorney General of Texas and the thirty-one other State Attorneys General from the judgment entered in the proceeding below on January 18, 1991.

INTEREST OF AMICI CURIAE

The amici States have a significant interest in seeing that they have the right to enforce their own state false and deceptive advertising laws against airlines that engage in unfair and deceptive airline advertising practices in order to protect their citizens from the obvious harm such advertising may bring. If the decision of the Fifth Circuit is allowed to stand, the amici States, indeed all States, may be barred from protecting their citizens from deceptive airline advertising. Such an evisceration of the States' historic police powers to engage in consumer protection cannot be upheld absent a clear and manifest mandate of Congress to that effect, a mandate that was clearly lacking in this case. Furthermore, the amici States have a strong interest in seeing that they not be subject in the future to the overreaching assertion of jurisdiction by a single Federal District Court on the basis of a mere special appearance, when there is no valid basis for personal jurisdiction, and where there is also no ripe controversy providing the court with subject matter jurisdiction to issue injunctive relief.

ARGUMENT

I. The Fifth Circuit's Holding that State False and Deceptive Advertising Laws are Preempted is Plainly Wrong as a Matter of Law and Conflicts with Decisions of this Court, other Courts of Appeals, a State Appellate Court, and Numerous United States District Courts.

In *Nader v. Allegheny Airlines*, 426 U.S. 290 (1976), this Court held that § 411(a) of the Federal Aviation Act, 49

U.S.C. § 1381(a), authorizing the Civil Aeronautics Board (CAB) to issue cease and desist orders against unfair or deceptive practices or unfair methods of competition, did not impliedly preempt state common-law tort actions based on fraudulent misrepresentation by an air carrier. In allowing state law causes of action to proceed, this Court stated that "§ 411(a) confers upon the Board a new and powerful weapon against unfair and deceptive practices that injure the public. But it does *not* represent *the only*, or best, response to all challenged carrier actions that result in private wrongs." 426 U.S. at 303 (emphasis added). By analogy therefore, § 411(a) does not impliedly preempt State false and deceptive advertising laws. Even if a particular airline advertising practice did not constitute an unfair or deceptive practice under § 411(a), the states would still be allowed to enforce their own state false and deceptive advertising laws against the practice. *Cf. Nader*, 426 U.S. at 301-02 ("No power to immunize can be derived from the language of § 411. . . . Section 411 is both broader and narrower than the remedies available at common law.").

Although the federal preemption provision, § 105(a)(1) of the Federal Aviation Act, 49 U.S.C. § 1305(a)(1), was not enacted at the time of *Nader* (being added in the Airline Deregulation Act of 1978), § 411(a) has remained essentially unchanged, except for the fact that the Department of Transportation, and not the Civil Aeronautics Board, is now the federal governmental body responsible for monitoring unfair and deceptive practices in the airline industry. Therefore, *Nader*'s holding of no implied § 411 preemption of state laws concerning unfair and deceptive practices is still the law today.

Because any implied preemption argument was foreclosed by *Nader*, the Fifth Circuit instead based its decision on an erroneous interpretation of the § 105(a)(1) preemption provision added by the Airline Deregulation Act, which states:

> [N]o state . . . shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to *rates, routes, or services* of any air carrier having authority under subchapter IV of this chapter to provide air transportation.

§ 105(a)(1) (emphasis added). Because the states in the exercise of their police powers have historically and traditionally been the primary regulators in the area of consumer protection, preemption of such matters will not be found unless that is the "clear and manifest purpose" of Congress. *See Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Not only can no clear and manifest purpose of Congress to preempt state regulation of false and deceptive advertising practices be discerned in either the plain language of § 105(a)(1) or its legislative history, but in fact the plain language and history actually suggest the exact opposite.

Section 105(a)(1), by its plain language, only preempts laws directly relating to *rates*, *routes*, or *services*, and not to laws controlling the *advertising* of rates, routes, or services. *See People v. Western Airlines*, 155 Cal.App.3d 597, 600, 202 Cal. Rptr. 237, 238 (1984), *cert. denied*, 469 U.S. 1132 (1985); *Kansas v. Trans World Airlines*, 730 F.Supp. 366, 368 (D.Kan. 1990). Had Congress intended to preempt State false and deceptive advertising laws, it could have easily done so by simply adding the phrase,

"or the advertising thereof." The States' false and deceptive advertising laws are not intended to, and do not in fact, determine anything at all with regard to what airlines charge, what routes they take, or what services they provide. State false and deceptive advertising laws merely ensure that whatever the rates, routes, and services the airlines choose to have, which amici States concede they may not regulate, that they are not deceptively advertised in the free market. *See New York v. Trans World Airlines*, 728 F.Supp. 162, 176 (S.D.N.Y. 1989). The Fifth Circuit's attempt to construe "relating to rates, routes, or services" to encompass advertising is thus unwarranted.

The Circuit's heavy reliance on *Shaw v. Delta Air Lines*, 463 U.S. 85 (1983), is misplaced. In *Shaw*, this Court held that a New York Human Rights Law forbidding discrimination in employee benefit plans on the basis of pregnancy was preempted by a federal ERISA provision superseding all State laws "relat[ing] to any employee benefit plan." It was obvious in that case that the anti-discrimination provision would *directly* affect the *substantive* content of employee benefit plans and thus clearly "related to" employee benefit plans. Employers subject to the law would be substantively constrained in setting up their benefit plans. Here, however, the regulation of the advertising of rates does *not* directly affect the substantive rates themselves. The airlines are free to charge whatever they wish, regardless of any state deceptive advertising restrictions. Thus, *Shaw* is wholly inapposite.

To the extent State penalties or injunctions on deceptive airline advertising or the adoption of practices by an airline to avoid such state enforcement actions indirectly

affect rates, such an impact on rates would be merely *incidental*. As this Court stated in the exactly analogous situation in *Nader*, "any impact on rates that may result from the imposition of tort liability or from practices adopted by a carrier to avoid such liability would be merely incidental." 426 U.S. at 300; *see also Western Airlines*, 155 Cal.App.3d at 600, 202 Cal.Rptr. at 239.

There is, in fact, an important intercircuit conflict that needs resolution here. The Ninth Circuit, for example, has rejected the sort of overly expansionist reading of § 105(a)(1)'s "relating to" language at the root of the Fifth Circuit's decision. *See, e.g., West v. Northwest Airlines*, 923 F.2d 657, 660 (9th Cir. 1990); *Air Transport Ass'n of America v. Public Utilities Comm'n*, 833 F.2d 200, 207 (9th Cir. 1987), *cert. denied*, 108 S.Ct. 2904 (1988).

The legislative history also unambiguously supports the position that § 105(a)(1) was only intended to preclude state laws that directly impact rates, routes, or services, and not the deceptive advertising of those matters. There is no reference in the legislative history to § 105(a)(1) that even mentions airline advertising. The section was enacted with the intent of providing for exclusive federal control of airline rates, routes and services, with such federal control to be limited in the context of deregulation. It would, of course, have been inconsistent with deregulation to allow the states to simply fill the void left by federal deregulation. Hence, § 105(a)(1) was needed to prevent any attempts by the states to regulate airline rates, routes, or services. But state regulation of airline *advertising*, so long as the state does not attempt to affect or determine the rates, routes, or services themselves, does not in any way interfere with

Congress' goal of deregulation of airline rates, routes, and services.

In enforcing their deceptive advertising laws against the airlines, the States have no interest in what the airlines charge, but only seek to ensure that they represent their charges fairly and nondeceptively. The Fifth Circuit's only other argument to support their overbroad construction of § 105(a)(1), outside of the flawed *Shaw* analogy, is essentially an implied *§ 411* preemption argument. It notes, for example, that the CAB's § 411 powers were not terminated under the Airline Deregulation Act, but rather were eventually transferred by operation of law to DOT, and somehow concludes that Congress thereby intended to protect consumers by providing a uniform system of federal regulation of unfair or deceptive practices by airlines. *See Trans World Airlines v. Mattox*, 897 F.2d 773, 782-83 (5th Cir. 1990). This, of course, is the very same implied preemption argument flatly rejected by this Court in *Nader*. *See supra* pp. 2-3. The only uniformity that Congress intended was in connection with rates, routes, and services, *see* H.R. Rep. No. 1211, 95th Cong., 2d Sess., *reprinted in* 1978 U.S. Code Cong. & Admin. News 3737, 3751-52, but with regard to deceptive *advertising*, Congress allowed both a federal and state presence. *Cf. Nader* (allowing state common law misrepresentation claim to coexist with § 411).

In sum, not only was this Court's stringent preemption standard of a "clear and manifest purpose" of Congress not satisfied with regard to preemption of state deceptive advertising laws, but if there was any clear Congressional intent at all regarding airline advertising,

it was that the states should be free to enforce their deceptive advertising laws.

Other conflicts also merit review here. The United States Court of Appeals for the District of Columbia implicitly rejected § 105(a)(1) preemption of state deceptive advertising laws in *Alaska v. U.S. Dep't of Transportation*, 868 F.2d 441 (D.C. Cir. 1989). The State of Alaska was held to have standing to challenge various DOT airline advertising rules (on the ground that the rules were not adopted pursuant to proper notice-and-comment procedures) because the rules would conflict-preempt state deceptive advertising laws. If § 105(a)(1) expressly or impliedly preempted all state deceptive advertising laws, then Alaska would not have had standing to challenge the specific DOT rules, because Alaska's injury, the inability to enforce their deceptive advertising laws, would not be redressed by a striking down of the DOT rules. In other words, the Court's holding was premised on the assumption that only *conflict* preemption was at issue, and that there was no express or implied preemption of all state advertising laws under § 105(a)(1). 868 F.2d at 444 ("The 1988 [DOT] Orders . . . provide the only possible basis for preemption of state regulation. . . .).

The California Court of Appeal in *People v. Western Airlines*, 155 Cal.App.3d 597, 202 Cal.Rptr. 237 (1984), and numerous United States District Courts, *see, e.g., Kansas v. Trans World Airlines*, 730 F.Supp. 366, 368 (D.Kan. 1990); *New York v. Trans World Airlines*, 728 F.Supp. 162, 176 (S.D.N.Y. 1989), have also expressly rejected § 105(a)(1) preemption of state deceptive advertising laws, in direct contradiction to the Fifth Circuit's decision.

In conclusion, this case presents an important question of federal law that affects the ability of all the States in the Union to protect their citizens from the direct injury caused to consumers from deceptive advertising, and the broader economic damage to the efficiency of a marketplace forced to operate with deceived market participants. If certiorari is not granted, there will be a continued waste of judicial resources as courts throughout the nation will be forced to resolve this issue. Furthermore, a definitive resolution by this Court will eliminate the existing burdens on all parties concerned (both the airlines, as well as the States) of having conflicting decisions controlling different parts of the Union.

II. Uncontroverted Case Law Clearly Establishes that the District Court Had No Valid Basis for Asserting Personal Jurisdiction Over any of the State Attorneys General, other than Texas', and Thus Its Extension of Injunctive Relief to Those Attorneys General Is Void.

The 33 Attorneys General had no contacts at all, let alone "minimum contacts," with the State of Texas that justified the Federal District Court in Texas' exercise of personal jurisdiction over them. *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). Similarly, the Texas Long-Arm Statute, Tex. Civ. Prac. & Rem. Code Ann. § 17.042 (Vernon 1986), which goes to the limits of Due Process, *see Placid Investments, Ltd. v. Girard Trust Bank*, 689 F.2d 1218 (5th Cir. 1982), does not provide for the exercise of jurisdiction over these 33 wholly out-of-state attorneys general who, from what is in the record, do not do any

business within the State of Texas, contract with Texas residents, or commit torts in Texas.

The only conceivable underpinning for the assertion of jurisdiction, and the one which formed the basis for the Fifth Circuit's decision, is the fact that those 33 Attorneys General entered a special appearance in the case in order to protect themselves from being bound by a potentially expansive reading of the District Court's original order. It is beyond dispute that those Attorneys General did not intend nor expect that their special appearance was to be deemed consent to the exercise of personal jurisdiction over them. Their motion was unequivocal on this point, stating:

> Without admitting or submitting to the subject matter jurisdiction of this Court and *without admitting that this Court has personal jurisdiction over them*, the States of Kansas, Alaska, [etc.] *specially appear* before this Court to move for an order denying the plaintiffs' motion for a temporary restraining order . . . .

(emphasis added).

Existing precedent and traditional notions of fair play and substantial justice do not allow such precautionary measures on the part of the 33 attorneys general to amount to consent to the exercise of personal jurisdiction.

The Fifth Circuit noted that the federal courts have abolished the distinction between general and special appearances but then drew the wrong conclusion. The abolition of the distinction means that a party need not insure that the proper procedures for a "special appearance" are followed in order to preserve objections to personal jurisdiction; what formerly would have been

called a "general appearance" will not even waive such objections. *See* 5A Wright & Miller, Federal Practice and Procedure § 1344. The use of the words "special appearance," however, do serve to emphasize that a party is not waiving his objections to jurisdiction. *See Bjorgo v. Weerden*, 342 F.2d 558, 560 (7th Cir. 1965).

Waiver only occurs where a *party* files a Rule 12 motion and fails to include an objection to personal jurisdiction, or fails to include the defense in its responsive pleading. *See* Fed.R.Civ.P. 12(h)(1); 5A Wright & Miller, *supra*, § 1391 at 741-42. Since none of the 33 attorneys general were even parties at the time they filed their special appearance, no 12(h) waiver could occur.[1]

Therefore, the Fifth Circuit instead finds personal jurisdiction, citing *Cactus Pipe & Supply v. M/V Montmartre*, 756 F.2d 1103 (5th Cir. 1985), and *Grammenos v. C.M. Lemos*, 457 F.2d 1067 (2d Cir. 1972), by claiming that the 33 attorneys general sought "affirmative relief" and thereby waived objections to personal jurisdiction. But *Cactus Pipe* and *Grammenos* do not support waiver under the facts of our case. Those cases stand for the proposition that where a party enters a case, fails to object to jurisdiction, and seeks *affirmative relief*, that party waives objections to personal jurisdiction. *See Cactus Pipe*, 756 F.2d at 1108 (*citing Grammenos*, 457 F.2d at 1070). Contrary

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[1] Moreover, the 33 attorneys general did effectively object to personal jurisdiction by noting in their motion that they were not admitting that the court had personal jurisdiction over them, and by arguing at the TRO hearing that the court had no personal jurisdiction over them.

to the Fifth Circuit's summary conclusion, the 33 attorneys general did *not* seek any such *affirmative relief*.

The Fifth Circuit erroneously believed that the attorneys' general request that the plaintiffs' TRO be denied was the equivalent of the seeking of affirmative relief. It was not. It was merely a request that the *plaintiffs'* demand for affirmative relief be denied. The *affirmative* relief mentioned in *Cactus Pipe* and *Grammenos* refers to *counterclaims* or other claims for relief benefiting the defendants, not the denial of relief to the plaintiff. *See* 5A Wright & Miller, *supra*, § 1397.[2] This distinction makes sense because one who seeks to employ the court's jurisdiction to achieve some affirmative relief for oneself should not then be heard to deny the court's jurisdiction as to the opposing party's claim. *See* 5A Wright & Miller, *supra*, § 1397 at 787-88.

In the case at bar, however, the 33 Attorneys General never sought to benefit from the Texas District Court's jurisdiction by seeking affirmative relief, but merely sought to ensure that the Court not grant relief for the plaintiffs against them.[3] Unlike the counterclaim situation, it is perfectly consistent for a party to come into court contending that the court has no jurisdiction over that party, and at the same time argue that, if the court

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[2] And it is not even settled that the assertion of counterclaims waives objections to personal jurisdiction. *See* 5A Wright & Miller, *supra*, at 788-92.

[3] Furthermore, even if the 33 attorneys general could be deemed to have sought affirmative relief, *Cactus Pipe* and *Grammenos* would still not suggest waiver because the attorneys general, as noted in footnote 1, did object to jurisdiction.

ultimately concludes that it does have jurisdiction, relief should not be granted against it on the merits.

In sum, there is absolutely no basis in the law for the Fifth Circuit's conclusion that the 33 Attorneys General waived their objections to personal jurisdiction by merely filing a motion requesting that plaintiffs' demand for equitable relief be denied.

Despite the fatal absence of personal jurisdiction over these attorneys general, the District Court invoked Rule 19 joinder, and the Fifth Circuit concocted a rule of "de facto intervention." None of these theories can overcome the fundamental jurisdictional problem discussed above.

In any event, Rule 19 can only be employed to join a "person who is subject to service of process." Rule 19(a). Because the 33 out-of-state attorneys general were not subject to service of process, see Fed.R.Civ.P. 4(e) & Texas Long-Arm Statute (there is no connection between these 33 attorneys general and the State of Texas), the District Court had no authority to invoke Rule 19 joinder, and the Fifth Circuit apparently agreed. Even if the Texas Long-Arm Statute allowed service of process upon these attorneys general, the district court would still not have had *in personam* jurisdiction over such attorneys general because they lacked the constitutionally required "minimum contacts" necessary to satisfy due process.

The Fifth Circuit, realizing the inapplicability of Rule 19, or Rule 24 intervention, resorted instead to the creation of a novel theory it dubbed "de facto intervention." There is simply no basis in the rules or in precedent for such a doctrine. This Court should not tolerate a federal court's amendment of the rules to suit its own agenda.

Equally importantly, there is no good reason to create such a fiction. The desire to render a "meaningful decision" surely cannot override the fundamental principles of due process violated by the local federal district court's attempt to assert its power over sovereign States clearly outside its jurisdictional reach. Moreover, it was unnecessary for the district court to extend its injunction beyond Texas in order to render a "meaningful decision." Furthermore, given the fact that the district court's conclusion on preemption is contrary to other courts' rulings on the matter, the district court should have been more reluctant, rather than less, to extend its controversial ruling to other States.

Most significantly, if this doctrine is allowed to stand, parties who fear being bound by pending court rulings would be forced to just sit by and hope that the court does not include them out of fear that any attempt they make to convince the court not to include them would subject them to that court's *in personam* jurisdiction. The Federal rules could hardly have intended such an absurd result.

The petition for certiorari should be granted in order to ensure that the District Courts do not ignore the fundamental due process limitations on their power.

III. Contrary to this Court's Longstanding Refusal to Allow Federal Courts to Issue Decisions in Cases Not Involving Actual Cases or Controversies, the District Court Improperly Extended Its Injunctive Order to Cover 28 State Attorneys General who had taken No Actions that Could Create a Ripe Controversy.

None of the plaintiff airlines alleged, nor could they allege, that any of the attorneys general, except those of

California, Kansas, Massachusetts, New York, Texas and Washington, have threatened or initiated any legal actions against any of the plaintiff airlines for violations of their respective deceptive advertising statutes. Because as to these 28 attorneys general there was thus no ripe "case or controversy" under Article III of the Constitution, the District Court lacked subject matter jurisdiction to include them within the scope of the injunction.

In order to meet the Article III "case or controversy" requirement, plaintiffs must "show that [they have] 'sustained or [are] immediately in danger of sustaining some direct injury' as the result of the challenged official conduct and the injury or threat of injury must be both 'real and immediate,' not 'conjectural' or 'hypothetical.'" *Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983). In this case, it is beyond dispute that it is merely conjectural and hypothetical that any of the 28 attorneys general who have not initiated or threatened to bring legal actions against the plaintiff airlines will do so sometime in the near future. This is especially so here, because, particularly if the airlines have their way, it is far from clear that the various state deceptive advertising statutes even prohibit any of the current practices of the plaintiff airlines. The federal courts cannot issue injunctive relief against purely speculative harm.

In order to ensure that this Court's longstanding adherence to Article III's "case or controversy" requirement not be subverted, this Court should grant the petition and vacate the District Court's overreaching injunction.

CONCLUSION

For the foregoing reasons, the amici States respectfully request that this Court grant the writs of certiorari filed by the Attorneys General of Texas and the 31 other States.

Dated: Honolulu, Hawaii, May 20, 1991.

Respectfully submitted,

WARREN PRICE III*
Attorney General
State of Hawaii
*Counsel of Record

GIRARD D. LAU
ROBERT A. MARKS
STEVEN S. MICHAELS
Deputy Attorneys General
State of Hawaii

425 Queen Street
Honolulu, Hawaii 96813
(808) 586-1363

Counsel for Amicus
Curiae State of Hawaii

[Other Counsel of Record
Listed on Inside Cover]